IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 2ND MARCH 2007 / 11TH PHALGUNA 1928

SA.No. 966 of 2001()

AS.9/1995 of V ADDL. DISTRICT COURT, ERNAKULAM
OS.299/1993 of PRINCIPAL SUB COURT,ERNAKULAM

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APPELLANTS/APPELLANTS/PLAINTIFFS:

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1. RATHI DEVI, AGED 40 YEARS, HOUSE WIFE, W/O.LATE KARVEETTIL GOPALAKRISHNAN AND c/O.KAIPPILLIL VEETTIL GANGADHARA MENON, OCHANTHURUTHU DESOM, ELANKUNNAPUZHA VILLAGE

2. NIRMAL, S/O.RATHI DEVI, AGED 12 YEARS, STUDENT, REP.BY RATHI DEVI, THE 1ST APPELLANT

3. GOPI KRISHNAN, S/O.RATHI DEVI, AGED 5 YEARS, REP. BY RATHI DEVI, 1ST APPELLANT

BY ADV. SRI.K.V.JAYACHANDRAN
SRI.RAJU V.MATHEW
SMT.K.B.SMITHA

RESPONDENT/RESPONDENT/DEFENDANT:

SIVASANKARAN NAIR, AGED 71 YEARS, NEPHEW OF KARIEETTIL PARMESWARAN NAIR, RESIDING AT SREEDEVI MANDIRAM, EDAPPALLY VADAKKUMBHAGOM PAKUTHY, DO. KARA

(DIED ON 26.9.2001 LR's IMPLEADED VIDE ORDER DATED 19.1.06
IN IA NOS.1510 & 1511/05 & CMA 510/05

ADDL.R2. SANTHA SIVASANKARAN NAIR, AGED ABOUT 62 YEARS W/O.SIVASANKARAN NAIR, RESIDING AT SREEDEVI MANDIRAM, EDAPPALLY VADAKKUMBHAGOM PAKUTHY, EDAPPALLAY NORTH.P.O., KOCHI-24.

ADDL.R3 SREEDEVI SASIDHARAN, AGED ABOUT 42 YEARS,

D/O.SIVASANKARAN NAIR, RESIDING AT SREEDEVI MANDIRAM, EDAPPALLY VADAKKUMBHAGOM PAKUTHY, EDAPPALLAY NORTH.P.O., KOCHI-24.

ADDL.R4 SREEKUMAR.K.S. AGED ABOUT 40 YEARS, S/O.SIVASANKARAN NAIR, RESIDING AT SREEDEVI MANDIRAM, EDAPPALLY VADAKKUMBHAGOM PAKUTHY, EDAPPALLAY NORTH.P.O., KOCHI-24.

ADDL.R5 SOMASEKHARAN.K.S, AGED ABOUT 35 YEARS S/O.SIVASANKARAN NAIR,RESIDING AT SREEDEVI MANDIRAM, EDAPPALLY VADAKKUMBHAGOM PAKUTHY, EDAPPALLAY NORTH.P.O., KOCHI-24.

ADDL.R6 KRISHNAKUMAR.K.S., AGED ABOUT 32 YEARS, D/O.SIVASANKARAN NAIR,RESIDING AT SREEDEVI MANDIRAM, EDAPPALLY VADAKKUMBHAGOM PAKUTHY, EDAPPALLAY NORTH.P.O., KOCHI-24.

ADDL.R2 TO R6 BY ADV. SRI.ASP.KURUP
SRI.SADCHITH.P.KURUP

THIS SECOND APPEAL HAVING COME UP FOR ADMISSION ON 02/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A .NO. 966 OF 2001

Dated 2nd March 2007

J U D G M E N T

Plaintiffs in O.S.299/93 on the file of Sub court, Ernakulam are appellants. Defendant is the respondent. Suit was filed for a declaration that Ext.A2 sale deed is not binding on plaintiffs and to set aside the same and for recovery of possession of plaint schedule property. Case of appellants was that Gopalakrishnan, husband of first appellant and father of appellants 2 and 3 are the son of Devaki Amma and plaint schedule property was set apart to the Thavazhy of Devaki Amma and her daughter deceased Saraswathi as per partition deed No.3312/1119 of S.R.O, Edappally and Gopalakrishnan was born thereafter and he derived a right over the thavazhy property by his birth and while so, Saraswathi died as a child and her right also devolved on Gopalakrishnan. Devaki Amma sold a portion of property along with Gopalakrishnan during 1983 under Ext.A1 sale deed. Gopalakrishnan died on 5/12/1991.

After the death of Gopalakrishnan, Devaki Amma was mentally weak and was not mentally free to take her own decisions. It was alleged that respondent exerting undue influence on her and prevailed over Devaki Amma to execute Ext.A2 sale deed and property was sold, as if the property belongs absolutely to Devaki Amma. It was contended that being legal heirs of Gopalakrishnan appellants have also right over the property and Ext.A2 sale deed is vitiated. It was contend that as legal heirs of deceased Gopalakrishnan, appellants have 3/8th shares in the property and Devaki Amma had 5/8th shares and appellants are entitled to get a decree for declaration that Ext.A2 sale deed is not valid and binding on plaint schedule property and also to set aside Ext.A2 which is void due to undue influence and appellants are entitled to get decree for recovery of possession also.

2. Respondent filed written statement contending that plaint schedule property having an extent of 27 cents was obtained by Devaki Amma and her daughter Saraswathi as per partition of 1119 and Gopalakrishnan was born several years thereafter and he has no right over the property and in 1992 Devaki Amma sold the property to respondent for valid consideration and before the sale Gopalakrishnan had died and Devaki Amma

has no mental incapacity as alleged and Ext.A2 is a valid document and appellants are not entitled to the decree sought for.

3. Learned Munsiff framed necessary issues. On the side of appellants first appellant was examined as PW1 and a relative was examined as PW2. On the side of respondent he was examined as DW1. Exts.A1 and A2 were marked. Learned Munsiff on appreciation of evidence found that by birth Gopalakrishnan had a right over the plaint property as the property was allotted under partition deed in 1119 M.E to the Thavazhy consisting of Devaki Amma and her children and on the death of Saraswathi her right also devolved on Devaki Amma and Gopalakrishnan and on the death of Gopalakrishnan his rights devolved on appellants, his wife and children and therefore appellants have 3/8 share in the plaint schedule property. Learned Munsiff also found that appellants did not succeed in establishing that Ext.A2 is vitiated either by fraud, misrepresentation or undue influence Ext.A2 is valid as against share of Devaki Amma. Though decree for recovery of possession was sought learned Munsiff in the interest of justice granted a preliminary decree for partition of the 3/8 shares of appellants over plaint schedule property. Appellants challenged

the decree and judgment before District court, Ernakulam in A.S.9/1995. Learned Additional District Judge on re-appreciation of evidence confirmed the decree and judgment passed by learned Munsiff and dismissed the appeal. It is challenged in this appeal.

4. Appellants contended that first appellate court did not consider the grounds urged for challenging the judgment and on the evidence it should have been found that no consideration was paid for Ext.A2 and executant Devaki Amma was not having sound mental capacity to execute the sale deed and hence should have set aside Ext.A2 and held that respondent has no right over the property and appellants are entitled to recover the possession of property on the strength of their title.

5. Learned counsel appearing for appellants vehemently argued that there is no evidence to prove that consideration shown in Ext.A1 was paid by respondent to Devaki Amma and evidence also establish that Devaki Amma was not mentally sound to execute Ext.A2 sale deed at that time as after the death of Gopalakrishnan she was mentally weak and respondent by exerting undue influence got executed the sale deed and therefore decree and judgment are unsustainable.

6. On hearing learned counsel appearing for

appellants and on going through the judgment and decree of courts below, I do not find any substantial questions of law involved in the appeal. Plaint schedule property admittedly originally belonged to the Tharavadu of Devaki Amma. It was allotted to the Thavazhy of Devaki Amma and her daughter Saraswathi who was alive at that time. Gopalakrishnan, husband of first appellant and father of other appellants was born only subsequently. As property was allotted to the Thavazhy, by birth Gopalakrishnan has got right over the property. Though under Ext.A2 sale deed Devaki Amma sold property as if it belongs exclusively to her, learned Munsiff and learned Sub Judge rightly found that that sale deed will not affects the rights of Gopalakrishnan or the legal heirs of Gopalakrishnan and therefore upheld the case of appellants that being legal heirs of deceased Gopalakrishnan they have 3/8 shares over plaint schedule property. Courts below held that Ext.A2 will not effect the 3/8 shares of appellants and appellants are entitled to their share.

7. Though it was vehemently argued that after the death of Gopalakrishnan, Devaki Amma was mentally weak and was not free to take her on decisions and respondent succeeded in getting executed Ext.A2 sale deed

by undue influence, on appreciating the evidence courts below found that evidence is insufficient to prove undue influence or fraud or mis-representation. That is a question of fact. Exercising powers under Section 100 of Code of Civil Procedure, it cannot be interfered. Nothing was pointed out to interfere with that finding, except the argument that Devaki Amma was mentally weak and consideration was not paid. Documents show that consideration was paid. No other evidence was adduced. In such circumstances, I find no reason to interfere with concurrent findings of courts below.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.966 OF 2001

2ND March 2007

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